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WSGR ALERT

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NINTH CIRCUIT HOLDS THAT COMPUTER FRAUD AND ABUSE ACT DOES NOT APPLY TO USE OF INFORMATION OBTAINED THROUGH AUTHORIZED ACCESS

In an opinion with significant implications for trade secret law, employee mobility, privacy, and Internet users broadly, the Ninth Circuit Court of Appeals on April 10 issued its decision in *United States v. Nosal*. Writing for the *en banc* court, Chief Judge Alex Kozinski addressed the proper scope of the federal Computer Fraud and Abuse Act's (CFAA's) prohibition against using a computer in a way that "exceeds authorized access." Building on its prior case law, the court held that while the CFAA forbids unauthorized access to information, it does not prohibit the misuse of information initially obtained through authorized access.

In *Nosal*, the defendant, David Nosal, a former employee of the Korn/Ferry International Corporation, directed current Korn/Ferry employees to use their authorized access to a company database in order to download confidential information and pass it on to him. Those acts were a violation of the company's written policy. The Ninth Circuit rejected the prosecution's argument that authorized access to a computer system for an unauthorized purpose violates the CFAA. The court expressed concern that such a reading would criminalize millions of Americans' day-to-day computer activities.

This decision limits the use of the CFAA in the Ninth Circuit as a vehicle for trade secret misappropriation claims. While employers have made increasing use of the statute in recent years in actions against former or departing employees, *Nosal* shuts the door on that practice by clarifying that the violation of a corporate computer use policy is not grounds for CFAA liability. So long as an employee is permitted to access a device that contains information, the CFAA does not cover later misuse of the information obtained on that device. The court's decision leaves open other avenues of recourse for employers, such as state contract and trade secrets laws.

By holding the CFAA inapplicable to situations where computer access is authorized, *Nosal* also should constrain the act's application in consumer protection actions based on the behavior of software voluntarily installed by a user. Additionally, the CFAA no longer may serve as a basis for claims premised on violations of terms of service agreements or other computer use contracts, leaving those types of claims to be litigated through other causes of action. However, since the Ninth Circuit's interpretation of the CFAA is in direct conflict with the position taken by several other federal courts of appeals, *Nosal* may help lay the groundwork for review of this issue by the U.S. Supreme Court.

Wilson Sonsini Goodrich & Rosati actively is following developments in jurisdictions around the country with respect to trade secrets, employee mobility, privacy, and litigation involving the Internet. For questions about privacy law, please contact Michael Rubin, David Kramer, or another member of the firm's privacy and data security practice. For questions regarding trade secrets and employee mobility, please contact Fred Alvarez, Ulrico Rosales, Marina Tsatalis, Charles Tait Graves, Laura Merritt, or another member of the firm's employment and trade secrets litigation practice.

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